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IN THE HIGH COURT OF JUDICATURE ATBILASPUR

[C.G.]

CRIMINAL **APPEAL 533 OF 2001**

APPELLANT (IN JAIL) : Dholaram alias Amareshwar, s/o Shiv Prasad Kanwar, aged about 38 years, R/o Village-Podi, P.S. Lakhanpur,Distt. Surguja {Chhatisgarh}

Filed on 20-6-2001 by Shri Ayyaz Dubey Advocate

R. to AR

V E R S U S

RESPONDENT : State of Chhatisgarh through Station House Officer, P.S.Lakhanpur,Dist.Surguja {CG}

APPEAL UNDER SECTION 374 (2) OF CODE OF CRIMINAL PROCEDURE

XI-HC-22

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आदेश पत्रक

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: -
HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. DILIP R. DESHMUKH, JJ.

24-6-2005

Dr. N.K. Shukla, Senior Advocate with Miss Snigdha Dixit, Advocate for the appellant.

Mr. Akhil Mishra, Panel Lawyer for the State/respondent.

Today, the matter was listed for orders on M.(Cri.)P. No.991/2005, application for suspension of sentence and grant of bail. When the matter was taken up, learned Senior Advocate appearing for the accused/appellant submitted that whole case hinges on a single eyewitness, therefore, it may be finally heard and he is ready to argue the matter finally to which learned Panel Lawyer has no objection. On this, the matter was taken up for final hearing as the accused is in custody about last five years.

The accused/appellant by way of this appeal has questioned the legality of judgment dated 19th May, 2001, passed by the Sessions Judge, Surguja, in Sessions Trial No.318/2000, whereby the learned Sessions Judge after holding the accused/appellant guilty for the commission of offence under Section 302 of the I.P.C. for committing the murder of Baljeet, sentenced him to undergo imprisonment for life.

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The prosecution case in brief necessary for the disposal of this appeal is that in the morning of 31st August, 2000, deceased Baljeet along with Kaushalya, Brijendra & Bajariya went to 'Rad' river for the purpose of fishing, and after fishing they started returning to their home at about 11 a.m., on the way they distributed the fishes which were collected by them from the river. Brijendra & Kaushalya left to other side, whereas, deceased Baljeet & Bajariya started going to their home together, on the way, the accused having an axe in his hand met them. On account of old enmity, the accused started talking to Baljeet and with intention to commit the murder of Baljeet, he attacked Baljeet with axe which he was carrying. When Bajariya looked behind he saw that the accused attacked Baljeet four times with axe as a result of which Baljeet died instantaneously. Bajariya left for his residence and after reaching his residence he disclosed this fact to his wife and brother. The son of the deceased namely, Parmeshwar (PW-5) returned from the agricultural field to his residence at about 12 noon, then, Brijendra (PW-3) informed him about the death of his father. On hearing this he left for the scene of occurrence and saw that his father was lying dead in front of the house of Rati. He saw injuries on the neck & hand of his father, immediately went to Police Station: Lakhanpur and lodged the F.I.R Ex.P-9.

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After registration of the case and merg intimation Ex.P-10, PW-6 G.S. Pandey, Sub-Inspector, left for the scene of occurrence, inspected the body and after giving notice Ex.P-2 prepared Panchanama of the body Ex.P-3, and sent the body to Primary Health Centre, Lakhanpur for post-mortem examination under Ex.P-12. He also prepared the site plan Ex.P-4 and took into possession blood stained soil as well plain soil form the place of occurrence. He also took into possession the spade of the deceased which was lying nearby under Ex.P-7. On the next day i.e. 1-9-2000 he made enquiry from accused Dholaram after taking him into custody. During the custody, he gave information under Section 27 of the Evidence Act, regarding the axe, weapon of offence, that he has concealed the axe in the bushes on the bank of Sonsai Kanwar pond. At the instance of the accused, he recovered the said axe and took the same into possession under Ex.P-6. Thereafter, he took into possession clothes of the deceased under Ex.P-14, which were brought from the hospital. The axe, weapon of offence, was sent to the doctor for his opinion. The doctor gave his opinion Ex.P-15.

After completion of investigation, charge sheet was filed against the accused/appellant in the Court of Chief Judicial Magistrate, Ambikapur, who in turn, committed the case for trial to the Sessions Judge, Ambikapur.

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Learned Sessions Judge after hearing the Public Prosecutor and counsel for the accused and perusal of the record, was of the opinion that prima facie, offence under Section 302 of the I.P.C. was made out against the accused/appellant. Accordingly, he framed charge. However, the accused denied charge and claimed to be tried.

The prosecution in order to prove the offence against the accused/appellant examined as many as seven witnesses. Learned Sessions Judge recorded the statement of the accused/appellant under Section 313 of the Cr.P.C. in which the accused pleaded innocence about the crime and said he does not know why the witnesses have deposed against him and said that he has been falsely implicated in the crime. The accused has produced two witnesses namely, Saran Sai & Punidas in his defence.

Learned Sessions Judge after hearing arguments of the Public Prosecutor and counsel for the accused, and after holding the accused/appellant guilty for the commission of offence under Section 302 of the I.P.C. sentenced him to undergo imprisonment for life.

We have heard learned counsel for the parties.

As far as the question of nature of death of Baljeet being homicidal is concerned, learned Senior Advocate Dr. Shukla did not dispute this fact. PW-7 Dr. M.H. Parmar has stated that on 1-9-2000 he was working as Assistant Surgeon in Primary Health Centre, Lakhanpur, on that day he conducted post-mortem on the body of

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Baljeet and noticed seven cut injuries on his hand, neck and occipital region which were deep up to the bone. On dissection, he noticed that right carotid artery was found cut, muscles & vein of the neck were also found cut, trachea was cut, and 3rd & 4th cervical bones were also found cut. In his opinion, injuries were sufficient to cause death in the ordinary course of nature and were homicidal in nature. The cause of death was sudden blood loss resulting into shock. In view of the above evidence, it stands proved that nature of death of Baljeet was homicidal.

Now, coming to the involvement of the accused in committing the murder of Baljeet, the prosecution case rests on the evidence of eyewitness PW-1 Bajariya and circumstantial evidence i.e. recovery of the axe, weapon of offence, at the instance of the accused.

As far as the first point is concerned, learned Senior Advocate Dr. Shukla argued that perusal of F.I.R. shows that it was lodged by son of the deceased Parmeshwar in which he mentioned that some unknown person has committed the murder of his father Baljeet. Conduct of PW-1 Bajariya, who is said to be the eyewitness, is not beyond the shadow of doubt for the reason that he has stated that he witnessed the crime, thereafter, he left for his residence and only to his wife & brother at the residence he disclosed this fact, and did not disclose to anybody else. Learned Senior Counsel urged that looking to such a serious crime this conduct of the witness cannot be

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considered to be natural and normal. He submitted that on the very same day this person was taken by the Police to the Police Station and before that he did not disclose this fact to anybody, whereas, Investigating Officer (PW-6) G.S. Pandey states that Bajariya was brought to the Police Station only on the next day. Dr. Shukla further submitted that in view of this evidence of solitary witness and looking to the conduct of the witness it was the duty of the prosecution to have produced witnesses of the vicinity where the offence took place as that place was surrounded by number of houses and the offence was committed during the day light i.e. in between 11-12 O' Clock. In the above circumstances, Dr. Shukla also submitted that this witness cannot be considered to be wholly reliable and it is unsafe to hold the accused/appellant guilty based on the evidence of the solitary witness.

On the other hand, Mr. Mishra, learned Panel Lawyer submitted that name of this person (PW-1) Bajariya finds place in the F.I.R. that he was accompanying the deceased, therefore, his presence cannot be doubted on the scene of occurrence. He also argued that it is true that this witness did not disclose about the incident to anybody outsider or the Police, or family members of the deceased, but it depends from person to person how he behaves. Merely on this ground the testimony of this witness cannot be rejected. He further submitted that even the weapon of offence (axe) was recovered at the instance of the accused, as such, finding of the trial Court relying

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on the evidence of this witness is legal and requires no interference by this Court.

Having heard learned counsel for the parties, we have perused the evidence and judgment of the trial Court. There are certain facts which require to be noted down. PW-5 Parmeshwar has stated that when he returned from the field at about 12 noon, Brijendra informed him that "your father has been murdered", thereafter, he left for the scene of occurrence and after seeing the body, he reported the matter to the Police. However, PW-3 Brijendra has nowhere stated that he informed Parmeshwar and in para 3 of his evidence, he has stated that he came to know about the murder of Baljeet through Deepan Chowkidar when he went to call his maternal grand-father.

Now coming to the evidence of PW-1 who is said to be the eyewitness, he has stated that after fishing he along with deceased Baljeet, Kaushalya & Brijendra returned from 'Rad' river, on the way at about 11 a.m. they distributed the fishes which were collected from the river. Kaushalya & Brijendra left for their residence, he along with Baljeet went to the house of Charan Sai for chewing tobacco and after chewing tobacco they left for the residence. On the way, the accused came, Bajariya (PW-1) was ahead of Baljeet, he heard some sound and when he turned behind he saw that the accused was attacking Baljeet with axe, after first attack Baljeet fell down on earth, thereafter, the accused again assaulted Baljeet thrice with

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axe. In cross-examination, this witness has admitted that he came to his residence without disclosing this fact to anybody, in the evening Police came in jeep, and they took him in jeep to the place of occurrence, and enquired from him about 1 ½ hours, thereafter, they took him to Police Station: Lakhanpur. PW-5 Parmeshwar in his cross-examination has stated that when he reported the matter to the Police then, the Police came in jeep, when Police reached the village they called Bajariya and he was made to sit in the jeep and took Bajariya to the Police Station, whereas, the Investigating Officer (S.H.O.) G.S. Pandey (PW-6) in para 19 of his evidence has stated that on 31-8-2000 he came to know that who has committed the murder. It is incorrect to say that Bajariya was called by Police on the same day, he was called on the next day. Therefore, there is a contradiction about taking into custody of Bajariya regarding investigation. On the one hand, the I.O. says that Bajariya was called on the next day i.e. 1-9-2000, whereas, Bajariya and other witness (complainant) have stated that Bajariya was taken by the Police to the Police Station on the same day.

No doubt, the conduct of this witness (PW-1) Bajariya cannot be said to be natural and normal in the circumstances, when he went along with deceased Baljeet for fishing and Baljeet's murder was committed in day light in his presence, then in normal course it was expected of him to inform about the incident either to family

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members of Baljeet or to the Police which was not done by him. Therefore, he cannot be considered to be wholly reliable witness.

It is admitted fact that the place of occurrence was surrounded by houses and the offence was committed during the day light. As such, the prosecution could have produced witness from the locality who witnessed the crime. There was every possibility that the crime must have been witnessed by persons of that vicinity.

We are of the considered opinion that it is not safe, looking to the facts and circumstances of the case, to base conviction on the sole testimony of such a witness without any corroboration from other material including circumstantial evidence. In this connection, this witness has stated that he along with Baljeet went to the house of Charan Sai for the purpose of chewing tobacco. Even that Charan Sai has not been produced in order to establish that just before the incident, the deceased and this witness were together to witness the incident. Therefore, the prosecution has not been able to establish the presence of PW-1 on the scene of occurrence beyond reasonable doubt.

It is true that in every case it is not possible to establish motive of the accused, it is also not necessary for the prosecution to prove motive of the accused in every case, but motive plays very important role, particularly when clinching, reliable and trustworthy evidence is not coming forward in a case, in that situation, if motive is

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established then that can be taken as one of important circumstances in order to connect the accused with the crime. Similarly, in this case nothing has come on record, why the accused, all of a sudden without any rhyme or reason has committed such a heinous crime. Had the prosecution brought on record some evidence throwing light on motive of the accused in committing the crime that would have provided a link in the chain of circumstantial evidence. But unfortunately, nothing has been brought on record regarding motive.

Now, coming to the circumstantial evidence that the axe, weapon of offence, was recovered at the instance of the accused, the recovery witness of axe has turned hostile, but PW-6 I.O. G.S. Pandey, Sub-Inspector, has categorically stated that on 1-9-2000 the accused was taken into custody and he gave information Ex.P-5, in pursuance of that he got recovered the axe, weapon of offence. Dhoti of the accused was also taken into possession. Unfortunately, Serologist's report Ex.P-21 mentions that since blood was disintegrated, opinion could not be given regarding origin of blood. Even though, the FSL report is there in which it has been mentioned that blood was found on the axe, but it is settled law that unless Serologist's report is there to show that human blood was found on the weapon of offence and that too of the blood group of the deceased, it is not safe to connect the accused with the crime merely on the basis of recovery of weapon of offence, axe. Axe is such a

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thing which is normally kept in every house. Therefore, recovery of axe cannot be connected with the involvement of the accused in the murder of Baljeet.

In the circumstances, except the evidence of PW-1 Bajariya there is no other evidence, circumstantial or direct evidence, which corroborates the evidence of Bajariya, and in view of the evidence of Bajariya, as has been mentioned above, he is not the wholly reliable witness. Therefore, holding the accused/appellant guilty on such a testimony, which lacks in many areas, was not safe. Hence, we are of the opinion that finding of the trial Court convicting the accused/appellant for the commission of murder of Baljeet cannot be sustained for the reasons mentioned above.

In the result, the appeal succeeds and the same is allowed. The accused/appellant is acquitted of the charge under Section 302 of the I.P.C. He be set at liberty forthwith, if not required in any other case.

In view of this order, M.(Cri.)P.No.991/2005, I.A.Nos.298/2004 and 1188/2005 stand disposed of.

Parties are entitled for certified copy of this order.

Sd/-
L.C.BHADOO
Judge

Sd/-
Dilip Raosaheb Deshmukh
Judge

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